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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 173

MOUND COMPANY,

Petitioner,

v.

THE TEXAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit for the special and substantial reason that the Court of Appeals has decided an important Texas question in a way in conflict with applicable Texas law, and in a way in conflict with its own decisions as to the applicable Texas law, with the decided question controlling the judgment in this action to determine whether Petitioner validly terminated a lease on Texas land as to oil and gas. The Court of Appeals (Judge Rives dissenting), in affirming

the District Court judgment that there was no valid termination, has failed to mention, to discuss, to distinguish, to attempt to distinguish or even to consider decisions by the Texas courts or its own recent prior decisions establishing Texas mineral lease law applicable in lease termination cases involving Texas land, even though such decisions are governing under the undisputed facts of this case.

In this Petition the record from the court below will be referred to as "R" and the Appendix to this Petition will be referred to as "App".

Opinion Below

The District Court, without written opinion, made findings of fact and conclusions of law upon which it entered judgment for Respondent (R. 433-437). The Opinion of the Court of Appeals, affirming the District Court, is reported as *Mound Company* v. *The Texas Company* at 298 F. 2d 905 (1962). It is contained in the record (R. 595-607) and is appended hereto (App. 4).

The action was for declaratory judgment that Petitioner as lessor had validly terminated the Texas lease as to oil and gas because Respondent as lessee had started drilling or prospecting for oil but had not continued to drill at the time intervals which the lease required once prospecting operations for oil had begun. The issue is whether the uncontroverted evidence established that Respondent did begin "prospecting operations * * * with respect to oil". If so, Petitioner was entitled to judgment. A majority of the three-judge panel of the Court of Appeals, with Judge Rives dissenting, held that Respondent Texaco had not commenced prospecting or drilling for oil under the lease because wells in which Respondent Texaco admittedly explored for, and in at least two instances found oil, were holes drilled by Freeport Sulphur Company, as Respond-

ent's sulphur sublessee, in which such sublessee also explored for sulphur. In deciding the question of whether Respondent Texaco had commenced prospecting or drilling for oil, the Court of Appeals opinion refused to charge or credit Respondent with the actions of its sulphur sublessee in the drilling of the holes in which Respondent searched for and found oil and in which its sulphur sublessee searched for sulphur even though under the undisputed evidence all of the actions of the sulphur sublessee were pursuant to the sublease and were with the agreement, procurement, payment and participation of the Respondent.

Two members of the three judge panel of the Court of Appeals sitting in the case held in the opinion "that the trial court could find that the contract required something more than was actually done here to trigger the 30-day clause", i.e., the provision of the lease amendment requiring the Respondent to continue drilling without more than thirty day intervals between wells once prospecting operations for oil had begun, and further held "that the trial court could find as a fact that the lessee did not intend to start on a bona fide effort to discover oil". The consequence of the holding is that the Respondent may sit on this valuable oil and gas lease until 1986 without any further drilling or development for the benefit of Petitioner as the land owner.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on February 1, 1962 (App. 1, R. 608). Petitioner's first petition for rehearing was denied on March 27, 1962 (App. 2, R. 677). Petitioner's second petition for rehearing and motion for rehearing en banc were denied on April 27, 1962 (App. 3, R. 697). The jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

Questions Presented

(1) Is the holding of the Court of Appeals that Respondent would not be charged or credited with the drilling by its sulphur profit-sharing sublessee of the holes in which Respondent as oil and gas lessee explored for oil, in deciding the question of whether the lessee commenced "prospecting operations * * * with respect to oil", in conflict with Texas law as declared in *Willson* v. *Superior Oil Company*, Tex. Civ. App., 274 S.W. 2d 947, error refused n.r.e. (1955) and by its own decisions in *Mattison* v. *Trotti*, 262 F. 2d 339 (1959) and *Sinclair Oil & Gas Co.* v. *Masterson*, 271 F. 2d 310 (1959), cert. den. 363 U.S. 952 (1960)?

(2) Can a Texas oil, gas and sulphur lessee conduct a search for oil by the usual, customary and accepted methods normally employed in the oil and gas industry, i.e., the utilization of electric logs and side wall cores, in nine wells and discover oil in at least two of them, and still sustain a finding under Texas law that it has not begun "prospecting operations * * * with respect to oil" or started "drilling for oil" because the holes in which the explorations for oil were made had been bored by its sulphur sublessee and because the sulphur sublessee explored for sulphur in the same wells, even though under the uncontroverted evidence all of the activities of the sulphur sublessee in the drilling of the wells and in the operations conducted in the wells were under agreement with and with the participation, procurement and payment of the lessee?

Statement of the Case

This diversity-of-citizenship action was brought by Petitioner, Mound Company, against Respondent, The Texas Company, in the District Court for the Southern District of Texas seeking a declaratory judgment that a lease for

oil, gas and sulphur purposes executed in 1915 by Petitioner, as lessor, to Respondent's predecessor, as lessee (R. 460), had terminated as to oil and gas pursuant to the provisions of an amendment to the lease which was executed under date of January 1, 1942 (R. 515). The lease covered a tract of 2500 acres and a tract of 500 acres in Brazoria County, Texas. The 2500-acre tract, known as Hoskins Mound, overlies a shallow salt dome of the piercement type common to the coastal plain adjacent to the Gulf of Mexico in Texas and Louisiana.

In 1922 Respondent entered into a contract, actually a sublease, with Freeport Sulphur Company for the development of sulphur under the lease on a profit-sharing basis (R. 476) pursuant to which Respondent was receiving during all times pertinent to this case seventy percent of the sulphur profits (R. 483-484). Under the profit-sharing agreement Respondent has received over $58,000,000 from the sale of vast quantities of sulphur produced by Freeport under the lease (R. 161). Thus, Respondent, after the execution of its profit-sharing agreement with Freeport, owned the predominant financial interest in the lease rights as to sulphur and owned all of the oil and gas lease rights.

The sole question in this case is whether the lessee in 1950 commenced prospecting operations for oil with the use of a suitable drilling rig in a bona fide effort to discover oil as required and provided in the 1942 amendment, the controlling language of which is as follows:

"ARTICLE II

"It is agreed that ARTICLE SECOND of said oil, gas and mineral lease from Mound Company to . . . [Texaco] dated May 22, 1915, shall be amended to read as follows:

"'(a) On a date not later than that on which the lessee surrenders its right to mine sulphur from the Mound Company 3,000 acres and thereby is released from the obligation to make any further advance sulphur royalty payments, the lessee shall begin prospecting operations hereunder with respect to oil by putting at least one suitable drilling rig to work and shall continue such work with due diligence, in a bona fide effort to discover oil, until oil or gas is discovered in paying quantities on the Mound Company 3,000 acres or until the lessee shall have drilled to the depth herein stipulated .... If any time after drilling for oil has been started and before oil or gas is discovered in paying quantities on the Mound Company 3,000 acres, should the lessee permit more than thirty (30) days to elapse between the abandonment of one well and the commencement of operations for the drilling of another well, the lessor may at its option, unless such delay beyond thirty (30) days is caused by act of God or conditions wholly beyond the control of the lessee, terminate this lease, as to oil and gas, as to the Mound Company 3,000 acres.'"

Thus, prospecting or drilling for oil, once begun by the lessee, had to be continued without an interval of more than thirty days between wells until there was a discovery of oil or gas in paying quantities, and in the event of a longer interval the lessor had the right to terminate the lease as to oil and gas. It is the contention of the Petitioner that, under the undisputed facts, activities by Respondent (including activities by its sulphur sublessee with which Respondent is charged) constituted a prospecting or drilling for oil within the meaning of the above quoted provision and that as a consequence of the cessation of such operations without the discovery of oil or gas, lessor's notice of termination (R. 543) effectively terminated the lease as to oil and gas.

With sulphur deposits at Hoskins Mound nearing depletion in late 1949, Texaco and Freeport entered into a contract (R. 558) to drill a seismic well near the center of the salt dome and to conduct a seismic refraction survey in the well for the purpose of outlining the configuration of the salt mass, delineating the caprock and locating the flanks of the dome. Texaco joined in the program to get information for "*future drilling operations for oil*" (R. 554) and "*in connection with the possibility of conducting prospecting for oil and gas at Hoskins Mound*" (R. 558). It was then known to Texaco and contemplated by Texaco and Freeport that a number of flank wells would be located and drilled on the basis of the information obtained from the proposed refraction survey (R. 380, 381). The cost of drilling this joint seismic well to a depth of 3500 feet and running the seismic refraction survey above that depth was to be shared equally by Texaco and Freeport. While Freeport was interested only in sulphur, which it would expect to encounter commercially only at caprock, Texaco was interested both above caprock and below caprock — where oil and gas but not sulphur might be anticipated. Accordingly, Texaco initiated the negotiations which resulted in the agreement to drill the seismic well beyond 3500 feet to approximately 8,000 feet at the sole cost of Texaco both for drilling and the refraction survey below 3500 feet (R. 141-143). Texaco entered into a separate contract with McCollum Exploration Company, the company making the seismic survey above 3500 feet, for the running of the seismic survey below the depth of 3500 feet (R. 555). Texaco and Freeport were both to receive the seismic survey report to the depth of 3500 feet, but only Texaco was to receive the McCollum report for the depths below 3500 feet.

The joint seismic survey project was completed with Texaco paying some $32,000 as its portion of the cost of

drilling the seismic well and of the seismic survey above 3500 feet. Texaco paid McCollum $11,000 as the total cost of the seismic survey below 3500 feet (R. 141-143). In addition Texaco furnished certain heavy drilling equipment needed in the drilling of the well below approximately 3600 feet (R. 142).

The resulting reports of the refraction survey (Plaintiff's Exhibits 15-A through Q) served their two purposes for Texaco. First, the concluding paragraph of the report from McCollum Exploration to Texaco confirmed that

> *"The flanks of the dome and areas of overhang should offer numerous traps for the accumulation of oil and gas* * * *". (Emphasis supplied)

Second, the contemplated flank wells were spotted around the flanks of the dome as revealed by the refraction survey at locations selected by putting the information contained in the refraction survey to its intended use.

Proceeding as originally contemplated, Texaco and Freeport, immediately after the refraction survey was concluded and its results interpreted, executed a contract concerning the flank well program and Texaco's prospecting for oil and gas in the flank wells (R. 562), to which was attached a map of Hoskins Mound upon which the proposed flank well locations were encircled in red. Texaco inspected this map and approved these locations as suitable for its purposes (R. 389, 390). Under the agreement Texaco was to take over the flank wells after caprock had been reached and run electric logs and take sidewall cores in the wells. Texaco was to pay delay rig time to Freeport and to bear the entire risk of any damage resulting from or occurring during the take-over of the wells by it. Under the undisputed evidence, a joint flank well program was agreed upon under which Freeport would prospect for sulphur under the profit-

sharing sublease for the benefit of itself and Texaco, and Texaco would prospect for oil and gas, in a series of flank wells which would encircle approximately two-thirds of the perimeter of the salt dome and be drilled at places shown by the refraction survey to be good "traps" for oil and gas.

The program was carried out. The nine flank wells were drilled. In these exploratory flank wells Texaco first searched for oil and gas *above the caprock*, where oil and gas but not sulphur might be found, and then Freeport set casing and searched for sulphur *in the caprock*, where it might be found, in a comprehensive joint program which thoroughly explored the flanks of the salt dome for oil, gas and sulphur in a series of wells drilled "by the lessee" under the lease around approximately two-thirds of the perimeter of the dome (R. 338, 367).

Texaco was kept informed as to the progress of drilling in the flank wells (R. 564), and a notice procedure was established so that a Texaco petroleum engineer would be available on the wells at the proper time to take over the wells and to supervise the running of electric logs and the taking of sidewall cores (R. 565).

Texaco ordered and paid for electric logs run by Halliburton Oil Well Cementing Company in the nine wells. The electric logs indicated to Texaco personnel the probable presence of hydrocarbons in six of the wells and Texaco ordered and paid for sidewall cores in those wells. Halliburton took the cores at the coring points designated by Texaco after Texaco's examination of the electric logs and Texaco's selection of the points at which hydrocarbons were probably present (R. 143-147, 391). In every instance an authorized and qualified Texaco petroleum engineer or geologist was present on the wells, representing Texaco in signing for and supervising the work, examining field prints of the electric logs on the ground, determining from an

examination of the log whether sidewall cores should be taken, designating the points at which they were to be taken, and taking possession of the cores. (R. 147-154, 373). The sidewall cores recovered by Halliburton and delivered to Texaco were examined and described by a qualified and authorized Texaco paleontologist and the descriptions of the cores were noted upon the electric logs themselves as well as on individual core reports for each well (R. 154-157).

Plaintiff's Exhibits 20 through 28 (R. 567-575) are the electric logs and Plaintiff's Exhibits 29 through 34 (R. 576-581) are the sidewall core descriptions. These logs and core descriptions establish beyond question Texaco's thorough and extensive prospecting for oil and gas above the caprock at Hoskins Mound.

Electric logs and sidewall cores are not only the usual and accepted means employed in exploring for hydrocarbons in almost all oil and gas wells, but such is substantially their exclusive use (R. 400-401).[1] While electric logs and sidewall cores are used extensively in oil and gas explorations, they are not normally used in a search for sulphur (R. 168, 286). The record shows that of the more than one

[1] Electric logs are made by lowering an instrument into an open drilled hole prior to the setting of the casing. The instrument produces a series of curves on a strip of paper from and by which an expert interpreter may determine the characteristics of the strata through which the well has passed and the probable contents of the strata. A particular type of "kick" or flaring away of certain of the curves on the log is identified when observed by the trained interpreter as a favorable indication of the presence of producible hydrocarbons at the point or points in the well where such "kicks" or flares occur. To confirm the presence or absence of hydrocarbons in the stratum at which the favorable indication occurs, it is common practice in the oil and gas industry to take a sidewall core at such point. Such core is a small piece of soil from the wall of the well, which, after its recovery, can be handled, visually examined, smelled, and subjected to certain tests, e.g., exposure to a fluorescent light and immersion of a portion of it is in a solution of ether or other solvent to determine whether oil is actually present in the core. It is common in the oil industry for the examiner of the core to record his findings on what is known as a core description (R. 164, 165, 320).

thousand wells which Freeport drilled at Hoskins Mound electric logs and sidewall cores had not been taken in any of them, other than in the nine flank wells (R. 375-379). Electric logs are usual and ordinary procedures in drilling and prospecting for oil and gas and, according to the witnesses, were used in some ninety-five percent of the wells drilled for oil and gas on the Texas Gulf Coast (R. 165-166, 321). Electric logs and sidewall cores are commonly used and were in 1950 commonly used in drilling and prospecting for oil and gas on the flanks of salt domes such as Hoskins Mound (R. 167-168, 321).

The electric logs and sidewall core descriptions for Wells 1017 and 1028 established that oil was present in those wells and that Texaco found it. This is undisputed. Texaco's own expert witness concurred in this uncontroverted fact (R. 404-405). A Texaco employee declared the discovery and presence of oil in Well 1017 by writing "Oil Sd." on the electric log at a depth just below 2400 feet in that well (R. 568). The core description at that point (R. 576) described the core as having "fine grain", "good odor" (which meant odor of oil (R. 188, 328)), "good fluorescence" (which meant that oil was present (R. 189, 329)), and "light golden brown" color, which meant to the industry that when the core was exposed to a solvent it had an oil color (R. 189). Core description for Well 1028 showed the oil present and discovered in at least three strata (R. 578, 282, 293-294, 331-332). The core description for Well 1025 showed an indication of oil (R. 577).[2] The other core descriptions con-

[2] Striking significance should be attached to the fact that Texaco labeled the electric logs of the three wells in which oil was discovered by it, i.e., wells 1017, 1025 and 1028, "Confidential. Not to be released" (Plaintiff's Exhibits 21, 22 and 23; R. 568-570) but that the electric logs of the other three wells in which sidewall cores were taken *and in which oil was found to be absent were not so labeled* (Plaintiff's Exhibits 24, 26, and 27, R. 571, 573, 574; Plaintiff's Exhibits 32, 33 and 34, R. 579-584 being the logs and core descriptions on wells 1034, 1044 and 1047).

cluded with the expression "N.S." which in the oil industry means "no show", i.e., the absence of oil. In oil field terminology "no show" means that there has been exploration of the sub-surface strata in an oil well in a search for oil — a diligent effort to find oil — but that oil has not been found. Texaco's "shows" and "no shows" recorded on its core descriptions established both where oil was present and where oil was absent in the strata above caprock in an area covering two-thirds of the perimeter of Hoskins Mound.

In summary, electric logs were taken by Texaco in each of the nine wells, sidewall cores were taken by Texaco in six of them, and in three of them Texaco recorded that it had found oil.

It is physically possible to drill for oil, gas and sulphur simultaneously in a single bore hole (R. 267, 386-387). These nine flank wells had normal bore holes and were physically like any other oil wells. All that would have been required to complete either Well 1017 or 1028 as an oil well was to set casing and perforate it opposite an identified oil sand, install a production tubing string and wellhead equipment, and construct the necessary tanks to receive the oil (R. 197, 285-286, 335).

After learning of this prospecting for oil and gas conducted by Texaco in the nine flank wells, Mound Company gave written notice of its election to terminate the lease as to oil and gas in the 3000 acres, because prospecting and drilling for oil and gas had been commenced under the lease, but had not been continued as required by the 1942 amendment (Plaintiff's Exhibit No. 6, R. 543). This suit was filed (with requisite diversity of citizenship and jurisdictional amount) for a judgment declaring that the lease had been validly terminated as to oil and gas (R. 15). The District Court separated the actual physical operations

carried out by Texaco from those carried out by Freeport and, viewing them in isolation, found that Texaco had not drilled for oil (R. 433-436) and based thereon entered judgment for the defendant (R. 437, 438). The majority of the three judge panel affirmed these findings and this judgment. Judge Rives dissented and capsuled all that there is to this case in his first two sentences:

> "Both parties agree that the 1942 amendment defines 'drilling for oil' in terms of prospecting for oil with a suitable drilling rig in a bona fide effort to discover oil. With that definition, it seems to me that the undisputed evidence established that drilling for oil was started".

Argument on the Reasons Why The Writ Should Be Granted

The activities and the operations of Texaco and Freeport in their entirety — the totality of the undisputed physical facts which occurred at Hoskins Mound — indisputably constituted a prospecting for oil with a suitable drilling rig in a bona fide effort to discover oil, i.e., a "drilling for oil" as defined in Article II of the January 1, 1942 agreement. Only by the artificial device of separating integrated physical facts into hypothetical but nonexistent separate entities placed in imaginary different compartments, i.e., the Texaco activities and the Freeport activities, could the District Court and then the majority of the panel of the Court of Appeals decide that Texaco had not "drilled for oil". The District Court and the majority of the Court of Appeals panel held that Texaco did not prospect or drill for oil because Freeport carried out the drilling of the holes in which Texaco explored for oil and because Freeport searched for sulphur in the same holes. Each facet of this decision is contrary to the established law of the State of Texas.

Point One

The majority opinion and judgment of the Court of Appeals has decided an important question in a way in conflict with applicable law of the State of Texas as established in Willson v. Superior Oil Co., Tex. Civ. App., 274 S.W. 2d 947, error refused n.r.e. by the Supreme Court of Texas (1955) by deciding, contrary to that Texas case, that none of the actions of Respondent's sulphur sublessee in the drilling of the seismic well and in the drilling of and the operations conducted in the nine flank wells may be charged or attributed to Respondent (lessee), although the Texas law is that all of such actions of its sulphur sublessee are in law the actions of Respondent because under the undisputed evidence all of such activities were under agreement with and with the procurement, payment, and participation of the Respondent.

The question presented is an unusually important one to the jurisprudence of Texas and to its major industry, i.e., whether one mineral leasehold estate owner is to be charged or credited with the activities of another mineral leasehold estate owner on the same tract of Texas land in the drilling of wells and operations conducted therein when all of such activities, drilling, and operations were under agreement with and with the procurement, payment, and participation of the first mineral leasehold estate owner. The state courts of Texas have answered this question in the affirmative in the case of *Willson v. Superior Oil Company*, supra. The majority opinion and judgment of the Court of Appeals have answered the same question in the negative.

In the Willson case the Texas court held that the owner of a mineral leasehold estate covering a one-half interest in a tract of land could be credited with and get the benefit of the drilling of a well on the tract by the owner of a lease.

on the other one half interest because Superior Oil Company as the nondrilling lessee approved the drilling site, shared costs with the drilling lessee under a contract between them, and kept one of its engineers on location during the drilling by the drilling lessee. This participation by the non-drilling lessee under agreement with the drilling lessee was held to constitute the drilling of a well by Superior under the drilling obligation of its lease because the drilling by the drilling lessee "was the act of Appellee as well as the act of Jackson & Associates, and that the drilling and completion of the well in question and commercial production thereafter extended and kept the lease of Appellee in full force and effect". The facts are so closely parallel to those at bar as to render distinction insupportable, although there the non-drilling lessee was being *credited* with the activities of the drilling lessee, while the converse is true here in that Texaco should be *charged* with the activities of Freeport.

The *Willson* case declares at 274 S.W. 2d 950 that it is the only Texas case on the question, stating:

> "Neither Appellant nor Appellee has cited a Texas case in point on the principal question involved here and we have not found such a Texas case. Both parties, however, have cited an Oklahoma Supreme Court case, Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 87, 27 P. 2d 855, 91 ALR 188, which they contend is persuasive authority in their favor."

The rule of the *Earp* case was adopted and followed in the *Willson* case. The *Earp* case held that the owner of one mineral estate could claim the benefit of activities by the owner of another mineral estate on the same land where there was agreement by the non-drilling lessee in the activities and not merely "a passive and reluctant acquiescence". The Oklahoma court said:

> "Nor do we think that any particular form of agreement is essential to accomplish this result, it being sufficient if the lessee claiming the drilling operation as a compliance with the terms of his lease can rightfully say that the exploration and development of the premises is his act, in whole or in part. However, in order to claim the act of drilling as his own, it is obvious that there must be something more than a mere passive acquiescence in the drilling by another lessee under a separate lease".

It can be demonstrated from the face of the majority opinion that the rule of the *Willson* and *Earp* cases is applicable and governing and charges Texaco with all of the drilling activities and operations of Freeport in both the seismic well and the nine flank wells. That opinion concedes on page 5 (App. 8) that the seismic well was drilled under agreement between Texaco and its sulphur sublessee Freeport and with the procurement, payment, and participation of Texaco, viz.:

> "Thereupon, an agreement was made by the two companies by which Texaco was to receive all the data uncovered by the drilling to a depth of 3500 feet, for which it would reimburse Freeport for one-half the cost and it would pay Freeport for the entire cost of drilling below the 3500 foot level. It was not disputed that Texaco's objective in participating in this venture was to obtain information that might enable it to determine whether oil was present on the lease".

The majority opinion on page 6 (App. 8) further concedes the participation of Texaco in the flank well program and its payment for a part thereof but then sharply separates Freeport's activities from those of Texaco and views Texaco's individual activities in isolation, viz.:

> "These were located and drilled by Freeport to see if it could locate additional sulphur deposits. • • • Texaco agreed to pay the cost of its logging and coring work and to reimburse Freeport for 'delay rig time' caused by this work. Otherwise Freeport did the drilling at its expense. Nine of these wells were drilled by Freeport and they were electrically logged and corings were taken for the account of Texaco."

In refusing to charge Respondent with any of the activities of Freeport in the drilling of and operations in the nine flank wells, despite Texaco's agreement, payment, and participation, the majority opinion states at page 10 (App. 12):

> "The testimony was undisputed that Freeport Sulphur Company would have performed substantially all of these acts *whether or not Texaco joined in and shared some of the expenses*". (Emphasis supplied).

It must necessarily be conceded, and the majority would seem clearly to agree, that there would be a prospecting and drilling for oil at Hoskins Mound under the undisputed evidence so as to permit Mound Company to terminate the lease if Texaco alone had drilled and paid for the nine flank wells and had run electric logs and taken sidewall cores searching for oil and gas in the sedimentary beds above the caprock and had prospected in the caprock for sulphur. The majority opinion looks at the activities of Texaco in running the electric logs and taking the sidewall cores in isolation and states that these alone are not sufficient to compel a finding of prospecting and drilling for oil.

This decision is clearly contrary to the decision of the Texas Court of Civil Appeals in the Willson case which would view the activities of both Freeport and Texaco in their entirety (as if performed by Texaco alone) in determining from the totality of the integrated operations whether there had been a prospecting and drilling for oil

"by the lessee" at Hoskins Mound under the lease. This is true because the undisputed evidence establishes that all of the activities of Freeport were under agreement with and by procurement, payment,[3] and participation of Texaco.

Point Two

The majority opinion and judgment of the Court creates a conflict as to Texas law within the Fifth Circuit between such decision and previous decisions recently rendered by the Fifth United States Court of Appeals in Mattison v. Trotti, 262 F. 2d 339 (1959), and Sinclair Oil & Gas Co. v. Masterson, 271 F. 2d 310 (1959), certiorari denied, 363 U.S. 952, 4 L. Ed 2d 870 (1960), because such decisions, contrary to the present decision, would charge Respondent under Texas law with all of the activities of its sulphur sublessee in the drilling of and in the operations of the seismic well and the nine flank wells where under the undisputed evidence all of the activities of the sulphur sublessee were under agreement with and with the procurement, payment, and participation of the Respondent.

In *Mattison* v. *Trotti*, supra, the Fifth United States Court of Appeals cited and applied the principle of Texas law laid down in *Willson* v. *Superior Oil Co.*, supra, and *Earp* v. *Mid-Continent Petroleum Corporation*, supra., i.e., whether a non-drilling lessee can be credited or charged with drilling by the lessee of another mineral leasehold estate on the same tract of Texas land is to be determined

[3] Emphasis is due the fact that Texaco in reality *paid 70% of all costs of all operations performed by Freeport at Hoskins Mound* (including the drilling of the seismic well and the nine flank wells) by virtue of Texaco's ownership of 70% of gross sulphur receipts *after payment of operating costs* (Plaintiff's Exhibit 1-C, R. 476, 483-484) and the further fact that *Texaco in reality owned 70% of the equipment used by Freeport in the drilling of the seismic well and nine flank wells* (Plaintiff's Exhibit 4, R. 540).

by whether there was agreement, procurement, participation or payment by the non-drilling lessee in the activities of the drilling lessee. The non-drilling lessee was denied credit for a well drilled by the drilling lessee in that case because the well "was not induced or procured by Appellants, nor was it drilled under any agreement or understanding" between the non-drilling lessee and the drilling lessee. It is emphasized that the non-drilling lessee "did not pay, agree to pay, or in any way contribute to the cost of the well". In other words, the very facts were absent there which are present here so that the principle recognized there when applied here necessarily charges Texaco because of its agreement, procurement, participation, and payment with all of the activities of Freeport in the drilling of the flank wells and the operations conducted therein.

In *Sinclair Oil & Gas Co.* v. *Masterson*, supra, the question before the Fifth Circuit was whether or not the oil lessee of Texas land had complied with its obligation to prospect for oil on the leased premises. The oil lessee claimed that the drilling of wells by the gas lessee satisfied the obligation of the oil lessee to prospect for oil. The Court of Appeals held that there had been no prospecting for oil by the oil lessee when there was no agreement by the oil lessee with reference to or participation by the oil lessee in the drilling of the wells by the gas lessee and when the wells drilled by the gas lessee did not even explore the likely oil bearing strata but on the contrary the gas lessee "was diligent to avoid getting into any liquids whether oil or water, because of the difficulties in walling them off so as to prevent interference of the production of gas". It is inherent in the holding that had the undisputed facts shown as they do here a participation by the oil lessee by agreement or payment in connection with the drilling of the wells by gas lessee, the drilling of such wells through

the oil producing sands, the turning over of the wells to the oil lessee for testing of such sands, the actual testing of such sands for oil, and the actual discovery of oil in some of the wells, it would have been held by the Court to have been prospecting for oil by the oil lessee.

The majority opinion and the judgment of the Court of Appeals have created doubt, uncertainty and confusion on the important question of whether the owner of one interest in the mineral leasehold estate may be credited with or charged with the drilling or other activities of the owner of another interest in the mineral leasehold estate in the same tract of Texas land by agreement, payment and participation, because the majority opinion refuses to charge Respondent as the oil and gas lessee with the drilling and other activities of its sulphur sublessee to which it agreed, to which it contributed and in which it participated, without discussing or even citing the Texas decision and the two decisions of the Fifth Circuit which hold to the contrary.

Conclusion

Article Second of the lease, as amended, contains no provision with reference to production or intention to produce oil. It relates only to "prospecting operations * * * in a bona fide effort *to discover oil*". It does not deal with *drilling to produce*. Production is governed entirely by Article Third (R. 522). The Court of Appeals has equated the starting by the lessee of the "drilling for oil" (in the sanctions provision of paragraph (a) of Article Second as amended) with the commencement of "prospecting for oil" with the use of "a suitable drilling rig" in a "bona fide effort to discover oil" (in the obligation provisions of that paragraph). Under that equation the uncontroverted facts

equal "drilling for oil" because it is uncontroverted that oil was discovered in at least two of the nine flank wells under the lease, that it was discovered in the course of an effort by Texaco to find it, that the effort was bona fide, that the effort was continued with diligence, and that there was a prospecting for oil with the use of a suitable drilling rig. These objective facts are not and cannot be disputed. The decision of the majority of the Court of Appeals panel that there was no prospecting or drilling for oil by Texaco is therefore "so clearly erroneous as to cause the ruling of the Court * * * to rest upon nothing more substantial than the power * * * arbitrarily to disregard established facts". *Chesapeake & Ohio Railway Company* v. *Martin*, 283 U.S. 209 (1931).

The *Willson*, *Earp*, *Trotti*, and *Masterson* cases tear down the impenetrable wall which the majority opinion seeks to erect between Texaco and Freeport. Under the doctrine of these cases, and under Texas law as announced and applied in three of them, Texaco is charged with the drilling of the nine flank wells as a consequence of its several agreements with Freeport, its direct and individual activities in and about the seismic well and the nine flank wells, its payments to Freeport and its bearing and sharing of other costs in connection with said operations. The majority opinion fails to cite any of the four cases.

Texaco commenced "prospecting operations * * * with respect to oil" and actually found oil in these wells. It accordingly started "drilling for oil"; and thereafter stopped, so as to give Mound Company the option to terminate the lease, which right it exercised. This case as so aptly characterized by Judge Rives in his dissenting opinion is "that simple".

It is accordingly urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

.....

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APPENDIX

JUDGMENT.

Extract from the Minutes of February 1, 1962

MOUND COMPANY,

No. 18910

versus

THE TEXAS COMPANY.

This cause came on to be heard on the transcript of the record from the United States Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Mound Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissents."

* * * * * * * * * *

* * * * *

* * * * * * * * * *

FILED

27 day of March 1962

Clara R. James

Clerk of the United States Court of Appeals

[108]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18,910

MOUND COMPANY,

Appellant,

v.

THE TEXAS COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(March 27 , 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges. PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

RIVES, C. J., Dissenting.

[108]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18,910

MOUND COMPANY,

Appellant,

v.

THE TEXAS COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(APRIL 27, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges. PER CURIAM:

This second petition for rehearing and the petition for rehearing by this Court en banc are hereby DENIED.

RIVES, Circuit Judge: I dissent.

IN THE

United State Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18910

MOUND COMPANY,

Appellant,

versus

THE TEXAS COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 1, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and RIVES, Circuit Judges.

TUTTLE, Chief Judge: This is an action seeking to cause the termination of an oil and gas lease on 3,000 acres of Texas land. The lease was executed in 1915 and covered oil, gas and sulphur. The lease was amended in 1921 so as to provide for payment to Mound of "advance sulphur royalties" which escalated to $15,000 per month from and after July 1, 1924. The lessee, Texaco, Inc., in 1922 entered into a contract with Freeport Sulphur Company under which the

latter would produce sulphur on a profit-sharing agreement. Under this agreement Freeport engaged in an active program of development and mining of sulphur at Hoskin's Mound, a salt dome located on the leased tract. In the course of this development it drilled some 1,000 sulphur wells and by 1955 it had exhausted the sulphur deposits. By this time Texaco had paid from its share of the sulphur production approximately $11,500,000.00 of sulphur royalties to appellant.

In 1942, in order to make provision for ending these obligations of Texaco to continue to pay the $15,000 monthly payments after the sulphur would be exhausted, an amendment to the lease was executed. It is conceded by both parties here that at this time Texaco had fully paid its advance royalties for some 40 years in the future — until 1985. This amendment is the document that must be interpreted to determine whether the appellant is entitled to a cancellation of the oil and gas rights in the lease. The only pertinent language is:

"ARTICLE II

"It is agreed that ARTICLE SECOND of said oil, gas and mineral lease from Mound Company to . . . [Texaco] dated May 22, 1915, shall be amended to read hereafter as follows:

"'(a) On a date not later than that on which the lessee surrenders its right to mine sulphur from the Mound Company 3,000 acres and thereby is released from the obligation to make any further advance sulphur royalty payments, the lessee shall begin prospecting operations hereunder with respect to oil by putting at least one suitable drilling rig to work and shall continue such work with due diligence, in a bona fide effort to discover oil, until oil or gas is discovered in paying quantities on the Mound Company 3,000 acres or until the lessee shall

> have drilled to the depth herein stipulated . . . At any time after drilling for oil has been started and before oil or gas is discovered in paying quantities on the Mound Company 3,000 acres, should the lessee permit more than thirty (30) days to elapse between the abandonment of one well and the commencement of operations for the drilling of another well, the lessor may at its option, unless such delay beyond thirty (30) days is caused by act of God or conditions wholly beyond the control of the lessee, terminate this lease, as to oil and gas, as to the Mound Company 3,000 acres.' "

Conceding that Texaco would not be required, under the terms of this amendment, to do anything in relation to prospecting for oil and gas until about 1986, and then only if it elected not to commence paying advance sulphur rentals again, Mound filed this suit claiming that it had elected to terminate the lease because Texaco had started "drilling for oil" and had thereafter (no production having been achieved) permitted more than 30 days to elapse without commencing "operations for the drilling of another well."

The conduct of the lessee, which Mound contends constituted "drilling for oil," and thus hastened by nearly 40 years the time when it must satisfy the 30-day clause, was the following:

By the latter part of 1949 the known sulphur deposits were being rapidly depleted.[1] Freeport determined to at-

[1] The following description of the salt dome, taken from appellant's brief seems accurate:

> "In a typical Gulf Coast piercement-type salt dome, such as Hoskins Mound, the salt core of matrix has penetrated the earth to a point near the surface. Piercement-type domes are so classified because oil production is generally around the flanks of the salt mass from strata or formations which have been pierced by the salt mass. On such domes, sulphur, if found, is discovered in the limestone caprock which is superimposed over the top of the salt."

tempt a refraction survey to ascertain, if possible, the shape and extent of the salt dome. As testified to by the Freeport Sulphur official whose responsibility it was, the following decision was made:

"Q. Would you tell the Court the story with respect to that particular well, how it came about that the well was located and who determined where it was to be located?

"A. At the time we drilled this well the mine was quite old. Most of the sulphur had been produced. We were very interested in continuing at Hoskins Mound and not overlooking some sulphur ore bodies. We hoped to find more sulphur on the edges of the dome where we hadn't previously drilled, or which were not completely explored.

"Since the dome sloped very steeply on the edges we were reluctant to drill in unknown areas for fear of missing the dome completely or being too high on the dome and not finding what we were looking for. So we decided to find out all we could about the shape of the dome by geophysical methods before we undertook to drill these edge wells, you might call them. So we conceived the idea of having a geophysical firm run a refraction seismograph test or tests on the dome and to do that we needed a well down into the salt, nearly in the center of the dome.

"So with the advance of the geophysicists and our group, we chose this well location in the middle of the dome and arranged to drill into the salt and conduct our seismic program.

"Q. You said you together with a geophysicist determined the location?

"A. Yes.

"Q. Did the Texas Company have anything to do with determining the location of this Well No. 983?

"A. No."

When this decision was made, the appellee decided that it would be valuable for it to have this survey well drilled to about 7500 feet rather than stopping at 3500 feet, which would satisfy Freeport's needs. Thereupon, an agreement was made by the two companies by which Texaco was to receive all the data uncovered by the drilling to a depth of 3,500 feet, for which it would reimburse Freeport for one-half the cost and it would pay Freeport for the entire cost of drilling below the 3,500-foot level. It was not disputed that Texaco's objective in participating in this venture was to obtain information that might enable it to determine whether oil was present on the lease.[2]

As a result of the drilling of this well, Freeport determined to drill several wells on the flank of the salt dome as now outlined by the refraction survey. These were located and drilled by Freeport to see if it could locate additional sulphur deposits. Discussions with Texaco resulted in Texaco requesting and obtaining permission to "acquire information from electrically logging and sidewall coring certain sulphur exploratory wells," which Freeport contemplated drilling. Texaco agreed to pay the cost of its logging and coring work and to reimburse Freeport for "delay rig time" caused by this work. Otherwise Freeport did the drilling at its expense. Nine of these wells were drilled by Freeport and they were electrically logged and corings were taken for the account of Texaco. This work

[2] The written agreement between the parties stated:

> "The Texas Company (hereinafter called 'Texas') is desirous of securing all the information obtained by reason of the drilling of the aforesaid well and the aforesaid geophysical survey, and in addition, Texas desires to have the aforesaid well drilling to a total depth of 7500 feet so that additional geophysical work in connection with such well can be conducted, Texas being desirous of obtaining all such information in connection with the possibility of conducting prospecting for oil and gas at Hoskin's Mound."

was completed in November, 1950. Thereafter no drilling for oil or gas has been undertaken and there has been no production of oil or gas.

Mound contends that in two of the nine wells oil was discovered in paying quantities and that the failure of Texaco to produce worked a termination of the lease; in the alternative, Mound contends that the foregoing activities of Texaco amounted to "drilling for oil" within the language of the amendment which required that thereafter such drilling must continue with due diligence until discovery of oil or gas in paying quantities and without more than 30 days delay from abandonment of one dry hole until commencement of operations for the drilling of a new well.

The trial court held against the appellant on both issues. We affirm the judgment of the trial court.

The appellant's principal argument here is that on the uncontroverted facts, set out in skeleton form above, the trial court could not find either as a fact or as a conclusion from the facts that the Appellee did not "start drilling for oil." It takes the position that the participation of Texaco in drilling the initial well in the center of the salt mound to attempt to ascertain its exact shape and extent, followed by the participation of Texaco in what was carried on by way of logging and core testing the nine peripheral wells indisputably an aid to determining the likely presence of oil and gas, constituted "drilling for oil" in the sense that when this was done this triggered the drilling clause of the lease, and Texaco must thereafter drill continuously until production was achieved.

We think, as did the trial court, that the lease can not be given such a construction.

In construing the lease, we must bear in mind that what we are to do is to determine from its language what was the intention of the parties. We must also bear in mind

that if its language is reasonably susceptible of a construction, argued for by one of the parties, that prevents a forfeiture, such construction is to be preferred to one resulting in a forfeiture. *Ryan* v. *Kent*, 36 S.W. 2d 1007 (Tex. Com. App.). See also *Decker* v. *Kirlicks*, 216 S.W. 385 (Tex. Sup. Ct.), and *West* v. *Continental Oil Co.*, 91 F. Supp. 505, aff'd. (5 Cir.) 194 F. 2d 869.

Here we start with the highly significant fact that for some 37 years the lessee would not be required, under the lease, to do *anything* relating to "prospecting" for oil. The next thing we must note is that both parties agree that the term "drilling for oil" is to be equated with the prior language which sets up the requirements which, in about the year 1986, the lessee must satisfy to prevent termination of the lease. These requirements are: "The lessee shall begin prospecting operations hereunder with respect to oil by putting at least one suitable drilling rig to work and shall continue such work *with due diligence, in a bona fide effort to discover oil* . . ." (Emphasis added.)

In construing the requirements of prospecting and drilling for oil, imposed upon the lessee to keep the lease alive after a certain date, we must bear in mind that the parties here are assuming postures contrary to what would normally be to their interests to take. The requirements contained in Part II of the 1942 Amendment are designed as requirements that the lessee must satisfy or it will lose its lease. Ordinarily, of course, if the lessee performed any act touching on prospecting or drilling, it would be urging that such acts fully discharged these requirements. The lessor on the other hand, would normally be urging on the court that the lessee's actions failed to measure up to the specific requirements of the lease. Here the positions of the parties are reversed. The lessee is taking the position that what it has done touching on exploration and or drilling

does not measure up to what it would be required to do in order to keep the lease alive, whereas the lessor is insisting that what the lessee has done would fully satisfy the requirements imposed on the lessee to prevent termination. However we consider the language that must be construed, we find that what the lessee would be required to do to keep the lease alive was something fairly specific: (1) Begin prospecting operations by (2) putting at least one suitable drilling rig to work, and (3) continue to work with due diligence (4) in a bona fide effort to discover oil. Clearly unless all these specific requirements were met then, under the concessions here before the Court, the lessee did not "start drilling for oil."[3] It makes no difference that the good faith of the effort to discover oil may be a somewhat subjective test. That is what the parties agreed to and thus it is what they are bound by. This is not to say that the only evidence of whether there was a good faith effort to discover oil was the testimony of those making the decisions. It is to say, however, that their testimony as to the purpose of doing the admitted acts and their intent in undertaking them was admissible, and, moreover, it became a question of fact whether there was such good faith effort intended and carried out.

Clearly there are areas of activity that may be carried out by a lessee to gather information bearing on the likelihood that oil might be found on the lease that appellant could not conceivably contend satisfied the "drilling for oil" requirement. When the two minerals, sulphur and oil, have been separated and different requirements are agreed to as to the two, then obviously, if the lessee performs activities that are ambiguous in nature, i.e., such as would

[3] This requirement being a condition precedent to creation of the obligation for continuous drilling, it must be strictly complied with. See Gulf Pipeline Co. v. Nearen, 138 S.W. 2d 1065.

be permissible as to sulphur, and without effect on oil drilling obligations if carried on under the sulphur lease, but which would be of utmost significance if carried on under the oil drilling terms of the lease, then the purpose and intent of the party performing these ambiguous acts must be determined.

Here, all the oral testimony by the parties who made the decisions to drill the exploratory well and the nine peripheral wells, was to the effect that these wells were decided upon without prior consultation with and without *requiring* any cooperation from Texaco. The testimony was undisputed that Freeport Sulphur Company would have performed substantially all of these acts whether or not Texaco joined in and shared some of the expenses. Thus it is that appellant's proposition is reduced to the argument that since what Texaco participated in by deepening the center well and by logging and core testing the nine other wells drilled for sulphur exploration was what a lessee drilling for oil would also do, then this activity by Texaco *as a matter of law* must be accounted as drilling for oil.

On the other hand, there was ample testimony tendered by the appellee to the effect that what it did in obtaining this kind of information from all available sources was what the owner of an oil lease would do, *preliminary* to drilling for oil.

Bearing in mind that under the contract appellee would not have to do anything relating to prospecting for oil until the year 1986, and bearing in mind that the lessor, as well as the lessee, could not possibly be injured but both would be positively benefitted by any fact finding surveys the lessee was willing to make at its expense and with no obligation to do so, short of "drilling in a bona fide effort to discover oil," we are fully convinced that the trial court could find that the contract required something more than

was actually done here to trigger the 30-day clause. We also conclude that the trial court could find as a fact that the lessee did not intend to start on a bona fide effort to discover oil. In this connection we use the term "bona fide effort" as meaning the kind of effort that lessee in 1986 would be called upon to exert to keep the oil lease in effect.

We can not believe that if Texaco were here offering such actions as it here performed, i.e., riding at least partially free on drilling done for the purpose of discovering additional sulphur deposits in wells placed appropriately for sulphur discoveries and logging and core testing such sulphur wells, the appellant would agree that this constituted a full performance of its obligation to drill with due diligence in a bona fide effort to discover oil so as to keep the lease alive. Moreover, we do not believe a Texas Court would hold that such activities would satisfy such requirement. Much less should a court find this to be so where a forfeiture of the oil lease is sought on the basis of such a finding.

In concluding that the ambiguous actions taken by Freeport and Texaco are subject to explanation by the parties who made the decisions, we do not overlook the proposition asserted by appellant that when subjective intent must be determined as a fact, all facts and circumstances must be looked to to enable the fact finder to make this determination and not just the secretly held purpose or intent of the actor. *Stitz* v. *National Producing & Refining Co.*, 247 S.W. 657; *Jordan Drilling Co.* v. *Starr*, Tex. Civ. App., 232 S.W. 2d 149. Certainly, however, where conduct is ambiguous as here there is no rule of law that excludes the testimony of the actor touching on the question: which purpose or intent did he have in performing the specified acts?

We next come to the second argument of appellant that in two of the peripheral wells oil in paying quantities was

actually discovered; and that failure to *produce* such oil automatically terminated the separate lease on 2500 of the 3000 acres. The nature of the proof that there was actual discovery was opinion testimony of experts based on an analysis of the electrical logs and the cores taken from two of the wells. The trial court considered the opinions that there was oil in paying quantities too speculative for it to accept in light of expert testimony from other witnesses that it would be impossible to conclude with any degree of certainty that such quantities were present on the basis of the hypothetical questions presented. It is clear that the trial court felt that the inability of the witnesses to estimate probable production in number of barrels greatly weakened their testimony. Appellee cites the Texas case of *Union Sulphur Co.* v. *Texas Gulf Sulphur Co.*, 42 S.W. 2d 182, as supporting the trial court's view that only actual production could prove the existence of minerals in paying quantities. While we do not feel prepared to conclude that the Texas courts have gone this far, it is nevertheless true that the weight to be given to opinion evidence is a matter for the trial court's determination. The trial court is not bound by the opinion evidence of experts even when uncontradicted. *New York Insurance Co.* v. *Johnston*, 5 Cir., 256 F. 2d 115; *Western Canada Steamship Co.* v. *United States*, 9 Cir., 245 F. 2d 921; *Arena Co.* v. *Minneapolis Gas Co.*, 8 Cir., 234 F. 2d 451. Moreover, here there was opinion evidence to support the trial court's finding that the appellant had failed to carry its burden of proving discovery in paying quantities.

We conclude that the judgment of the trial court was amply supported in fact and law. It is, therefore,

AFFIRMED.

RIVES, Circuit Judge, dissenting:

Both parties agree that the 1942 amendment defines "drilling for oil" in terms of prospecting for oil with a suitable drilling rig in a bona fide effort to discover oil. With that definition in mind, it seems to me that the undisputed evidence established that drilling for oil was started. Texaco contends that no oil or gas in paying quantities was discovered and I would agree with the finding of the district court to that effect. Nonetheless, when Texaco permitted more than 30 days to elapse between the abandonment of one well and the commencement of operations for the drilling of another well, Mound Company had an option to terminate the lease as to oil and gas. If the option existed, it was unquestionably exercised. The clear duty of the Court is to hold the parties to the terms of the agreement which they executed. With deference to the district court and to my brothers, the case appears that simple to me.

I therefore respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana, Apr. 30, 1962

Office-Supreme Court, U.S.
FILED
JUL 5 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

MOUND COMPANY,

Petitioner,

v.

THE TEXAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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GORE PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.....

MOUND COMPANY,

Petitioner,

v.

THE TEXAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

As so clearly appears from the opinion of Chief Judge Tuttle, this case is governed by simple, well-established rules of law. Because the elemental nature of the questions controlling this case are somewhat obscured by petitioner's unilateral and partisan interpretations of the record, the following additional statement is respectfully submitted:

The initial lease of mineral rights to respondent executed in 1915 was amended in 1921 when sulphur was discovered. The effect of this amendment was to defer operations for oil upon the payment to petitioner of minimum advance sulphur royalties escalating to $15,000 per month by 1924. (Plf. Ex. 1-B, R. 466-75) These advance sulphur royalties and royalties from sulphur production, aggregating ap-

proximately $11,500,000, were paid to petitioner for over 30 years, and were retained by petitioner. (R. 409) The 1921 amendment, and, the resultant payment of these advance royalties, to petitioner's great benefit, relieved respondent from any obligation to drill for oil until 1986. This is admitted by petitioner (R. 409). By the execution of this 1921 amendment, there occurred the first separation between sulphur operations on the one hand and oil and gas operations on the other.

The following year (1922), respondent executed a sublease or assignment of the sulphur mineral rights to Freeport Sulphur Company and retained a royalty interest of 70% of the net profits. (Plf. Ex. 1-C, R. 476-504) This agreement further separated sulphur operations from oil and gas operations, and thereafter Freeport alone operated the lease for sulphur and drilled approximately 1,000 wells for sulphur. (R. 356) Freeport had no interest in oil or gas rights. (R. 367) Freeport occupies an entirely separate corporate status from respondent, with no interlocking directorate and is in no respect under the control of respondent, Freeport is in the sulphur business, respondent in the oil and gas business. (R. 362)

Although relieved of any obligation to drill for oil until 1986, respondent could voluntarily drill for oil before that time. If respondent elected to do so, then, by the terms of a lease amendment dated January 1, 1942 (Plf. Ex. 2, R. 515-525), respondent had the duty to continue drilling without cessation for more than 30 days between wells under pain of forfeiture of its oil and gas leasehold estate.[1]

---

[1] Here again is still another division between mineral operations since under the 1942 agreement, the lease could be forfeited as to oil and gas by drilling for those minerals, and yet the sulphur rights would continue. The parties specifically provided *drilling for oil* alone would trigger respondent's continuous drilling obligation since it was contemplated that drilling for sulphur by Freeport would continue.

The complaint charged two grounds of forfeiture. The first one was predicated on the allegation that the lease amendment of January 1, 1942, provided that "at any time after drilling for oil has been started," the lessee was under the obligation to continue drilling for oil without cessation for more than thirty days between wells; that respondent had in fact drilled for oil but had failed to observe the continuous drilling requirement. Petitioner specifically set out in its complaint that its claim of forfeiture was based upon the following provision of the lease amendment of January 1, 1942:

> ". . . . At any time after *drilling for oil*[2] has been started, and before oil or gas is discovered in paying quantities on the Mound Company 3000 acres, should the lessee permit more than thirty days to elapse between the abandonment of one well and the commencement of operations, for the drilling of another well, the lessor may at its option, unless such delay beyond thirty days is caused by act of God or conditions wholly beyond the control of the lessee, terminate this lease as to oil and gas, as to the Mound Company 3000 acres." (R. 18-20)

Petitioner further charged in the alternative that there had been a discovery of oil in paying quantities on the lease as a result of drilling operations of the respondent and that there was a lapse of more than thirty days during which there was neither production of oil or gas from said tract nor actual drilling or reworking operations being conducted thereon. It was charged that this subjected the lease to forfeiture under Article III of the 1942 amendment. (Complaint, R. 20-22; Plf. Ex. 2, R. 515-525) Petitioner asserted that a finding in its favor on either contention would forfeit the lease.

[2] Emphasis supplied throughout unless otherwise indicated.

Petitioner's contention throughout the trial is tersely reflected in the following statement petitioner made to the trial court following the conclusion of the evidence:

> "This brief, then, is concerned principally with the facts of the case as established by the testimony, the admissions and the other evidence *since the judgment in the case will turn on the determination of the two ultimate fact issues of whether there was a prospecting and drilling for oil or a discovery of oil in paying quantities.*" (R. 415)

The only activities which petitioner claimed constituted drilling for oil are correctly stated in the majority opinion to have been (1) participation in the cost of a geophysical well and survey, and (2) the electrical logging and sidewall coring of nine wells drilled for sulphur by Freeport.[3]

Sulphur had been produced continuously for some 27 years when, in 1949, the known sulphur deposits were being rapidly depleted. (R. 356) While Freeport did not want to overlook any sulphur ore bodies, it did not want to drill edge wells on the periphery of the salt mass until a geophysical refraction survey had determined the shape of the salt dome. (R. 357) Accordingly, it conceived the idea of conducting a refraction survey from a hole drilled into the center of the salt mass. This hole or salt well is known as well 983. (R. 357)

After the location had been made and the drilling commenced, Freeport, in an effort to reduce its cost and knowing of respondent's interest in assembling geophysical information for possible future use, offered respondent an

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[3] Petitioner conceded in the trial court that the drilling of the geophysical well did not alone constitute drilling for oil. (R. 122) The well was located in the center of the salt dome where salt alone is found, and petitioner's president admitted respondent "had no right to expect anything other than salt." (R. 36) These concessions serve to limit the inquiry to the taking of the logs and cores in the sulphur wells drilled by Freeport.

opportunity to participate in the survey. (R. 357) This was done. The agreement between Freeport and respondent was reduced to writing (Plf. Ex. 13, R. 558-562) and for the Court's convenience is attached hereto as Appendix A. This agreement specifically provides that respondent was "desirous of obtaining all such information in connection with the possibility of conducting prospecting for oil and gas at Hoskins Mound".

The Freeport executive who was in charge of its operations testified that the results of the geophysical survey were used by Freeport to locate several edge wells which were drilled by Freeport in 1950 in an effort to find additional sulphur deposits. (R. 356, 359) The wells were drilled by Freeport to see if it could find more sulphur on the flanks. (R. 359) Respondent saw this drilling program as an opportunity to obtain geological information for possible future oil and gas operations and asked permission to electrically log and core the sulphur exploratory wells. (R. 372) Permission was granted by Freeport, and this agreement was also reduced to writing (Plf. Ex. 16, R. 562-564), a copy of which appears in this brief as Appendix B. This agreement refers to discussions between Freeport and respondent "looking toward an arrangement whereby The Texas Company might acquire information from electrically logging and sidewall coring certain sulphur exploratory wells which you (Freeport) contemplate drilling on the flanks of the Hoskins Mound dome . . ."

Respondent showed by the admissions of petitioner's own witnesses (including petitioner's President and Executive Vice President) that these activities were those which any prudent operator would take in assembling geological and geophysical data *prior to* drilling for oil. (R. 47-48, 213, 342-343) The testimony of Freeport officials in charge of the drilling of the wells in question was uniform and

unequivocal that these wells were located and drilled by it for sulphur (R. 84, 88, 89, 356, 359), were drilled solely at its expense (R. 361) and were actually used in the sulphur operation. (R. 361)

The case was tried to the court and both of the "ultimate issues of fact" petitioner represented to the court existed in the case were determined by the court adversely to petitioner.

The trial court found as a fact that these wells were not drilled for oil in whole or in part and were drilled by Freeport for the sole purpose of attempting to discover additional sulphur deposits. The trial court further found that respondent's activities were not a drilling for oil and gas, but related only to assembling geological and geophysical information. (R. 433-35)

Faced with (a) adverse findings to each of the issues of fact petitioner submitted to the trial court, and (b) the clearly erroneous provision of Rule 52(a), Federal Rules of Civil Procedure, petitioner argued on appeal that (1) drilling for oil had been established as a matter of law, (2) discovery of oil in paying quantities had been established as a matter of law and accordingly it was entitled to judgment. In so contending petitioner urged the same strained construction of the lease amendment of January 1, 1942, contended for herein.

The Court of Appeals, after a consideration of the petitioner's contentions on original submission and in two petitions for rehearing, concluded by majority opinion on each occasion that the evidence sustained the findings of fact and judgment of the trial court and that the lease amendment could not be given the construction contended for by petitioner. The Court of Appeals accordingly affirmed and held that the judgment of the trial court was "amply supported in fact and law."

Questions Presented

Respondent cannot agree that the questions presented in this case are as stated by petitioner. The questions as stated ignore the basic provisions of the lease amendment of January 1, 1942 and the facts found by the trial court, based largely on undisputed evidence.

Petitioner's first question ignores the basic lease provision under which *drilling for oil*, and that act alone, triggers respondent's continuous drilling obligation. It ignores the undisputed evidence that Freeport Sulphur Company alone located the wells and drilled them and that they were located and drilled for sulphur and were actually used in Freeport's sulphur operations. The trial court accordingly found that the wells were not drilled, in whole or in part, for the purpose of drilling for oil, and that respondent merely utilized the sulphur holes for the purpose of assembling geological data.

Petitioner's second question ignores the admissions of its own witnesses that the use of electric logs and side wall cores is a standard method of assembling geological data prior to drilling for oil. It ignores the undisputed evidence that respondent did not participate in the locating or drilling of the wells; that respondent did not procure the drilling of the wells; that the wells would have been drilled by Freeport for sulphur whether or not respondent took logs and cores; and that Freeport alone paid the cost of drilling the wells.

Both questions further ignore the undisputed fact that sulphur operations had been contractually separated from operations for oil.

Argument

I.

NO GROUNDS FOR REVIEW ARE SHOWN BY PETITIONER

There does not exist a single "special" or "important" reason for the granting of this writ, and petitioner has wholly failed to bring its petition within the requirements of Rule 19 of this Honorable Court.

This case is controlled solely by principles of local law. No federal question is involved. The questions involved are neither of general nor public importance. The decision is not in conflict with the decision of another Court of Appeals; nor is it in conflict with applicable state law on "important state or territorial questions."

Only "real and embarrassing conflicts of opinion and authority" justify intervention by writs of certiorari. *N.L.R.B.* v. *Pittsburg S.S. Co.*, 340 U.S. 498, 95 L.Ed 479; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 67 L.Ed. 712. A few brief paragraphs will show the conflict petitioner claims, far from being real and embarrassing, is actually only fanciful and non-existent.

Petitioner relies upon the case of *Willson* v. *Superior Oil Company*, 274 S.W. 2d 947 (Tex. Civ. App. 1955, error ref'd., n.r.e.)[4] in which the lessee of an undivided interest of the minerals claimed he was entitled to credit for the drilling undertaken by another lessee owning another un-

[4] It should be observed that the *Willson* case was decided by an intermediate appellate court. The Supreme Court of Texas refused a writ of error, "no reversible error." This action by the Supreme Court shows that it "*is not satisfied the Court of Civil Appeals in all respects has correctly declared the law*, but is of the opinion that the application presents no error which requires reversal." Texas Rules of Civil Procedure, Rule 483, which is set out in full as Appendix C.

divided interest in the same minerals. There was an operating agreement between them under which the first lessee — whether the well produced oil or gas or was non-productive — agreed to pay his portion of the drilling expenses. Three fundamental distinctions between that case and this one immediately appear: (1) In the *Willson* case (but not in this one) there was an agreement to share the drilling expenses; (2) There had been no separation between operations for different minerals; and (3) The first lessee was claiming the benefit of the drilling operations so as to extend the lease. These basic distinctions (and others, such as the difference in lease provisions) conclusively refute the existence of any conflict.

Additionally, petitioner claims the decision in this case is contrary to two decisions previously determined by the same Court of Appeals that decided this case. In the case of *Mattison* v. *Trotti*, 262 F. 2d 339, Judge Hutcheson (who also sat in this case), speaking for a unanimous court, held that one oil and gas lessee of an undivided interest *was not entitled to credit* for the drilling done by another oil and gas lessee of other undivided interests where the first lessee "did not pay, agree to pay, or in any way contribute to the cost of the well," and where the well "was not induced or procured" by him. Not only is the factual situation in that case entirely foreign to the case at bar, but in addition, the legal questions are entirely dissimilar. In the *Trotti* case there had been no separation between operations for different minerals. In this case, respondent did not induce or procure the drilling of the wells. (R. 359, 361) Moreover, respondent is not seeking credit for anything that Freeport did. Petitioner, without any basis whatever, is seeking to charge respondent with drilling for oil because Freeport drilled for sulphur, and under the holding of the very case petitioner cites — the *Trotti* case — this cannot be done.

The only other case from Texas cited by petitioner, *Sinclair Oil & Gas Co.* v. *Masterson*, 271 F. 2d 310, also supports the respondent's position and the decision of the lower courts. In that case, oil operations had been separated from gas operations and different firms owned the right to develop the premises for these two respective minerals. The court held both as a matter of fact and as a matter of law that drilling for gas by the gas operator did not constitute drilling for oil by the oil operator and refused to credit one lessee with the operations of the other. This is the only case cited by either party where there had been a separation of mineral estates, and significantly, the court held that drilling for one mineral did not constitute drilling for another. This Court denied certiorari in 363 U.S. 952, 4 L. Ed. 2d 870.

Fully supporting and buttressing respondent's contention that no conflict exists is the simple fact that the majority opinion, as petitioner puts it, fails "to mention, to discuss, to distinguish, to attempt to distinguish or even to discuss" the authorities relied upon herein by petitioner. (Petition, p. 2) Each of these cases was cited by petitioner and brought to the Court's attention on original submission and in petitions for rehearing. If a conflict exists in fact, it must be assumed that the Court of Appeals would have dealt with these decisions.

What is still more significant is that even the writer of the minority opinion, by the absence of the citation of any cases whatsoever, saw no conflict in the decision of the Court of Appeals between this case and the other decisions referred to by petitioner.

The issues as presented in both the majority and minority opinions turn on the sufficiency of the evidence and upon the construction to be given the 1942 lease amendment. Since writs of certiorari will not be granted "merely to

review the evidence or inferences drawn from it", *Fields v. United States*, 205 U.S. 292, 51 L. Ed. 807, and since this Court does not interfere where the determinations turn "on evaluation of testimony" *N.L.R.B. v. Pittsburgh S.S. Co.*, supra, the issues in this case cannot conceivably place this petition within the scope of Rule 19 as interpreted by this Honorable Court.

Accordingly, no basis for review has been shown.

II.

THE JUDGMENTS OF THE TRIAL COURT AND COURT OF APPEALS ARE CORRECT

The record shows that in the trial court, petitioner's case consisted primarily of "expert" proof designed mainly to establish that respondent had discovered oil in paying quantities, it being petitioner's position that failure to drill thereafter subjected the lease to forfeiture. This effort was aborted by admissions of petitioner's "experts" on cross-examination. The trial court found this issue against petitioner, and the Court of Appeals — all three Judges concurring — agreed with the finding of the trial court. Petitioner has abandoned this contention.

There remains only the contention that petitioner by availing itself of geological and geophysical data and information had engaged in drilling for oil. This contention, as now asserted, is based on a strained and untenable construction of the lease amendment of January, 1942. It will be noted that petitioner now treats the drilling for oil provision of this amendment differently than it did in its complaint and in the trial court. On page 2 of the Petition for Certiorari, petitioner states: "The issue is whether the uncontroverted evidence established that respondent did begin 'prospecting operations' . . . with respect to 'oil.'" But in its complaint petitioner realized that this was not

the correct interpretation of the lease amendment, so petitioner very clearly charged, not once but twice, that the defendant began "*drilling* and *prospecting*" (Par. III of complaint, R. 19; Par. IV of complaint, R. 20). Moreover, the provision of the lease amendment invoked by petitioner as the ground for forfeiture places no obligation on respondent to conduct continuous drilling obligations until "after *drilling for oil* has been started" and this provision is expressly pleaded in the complaint. (R. 19) We submit that petitioner's construction of the lease amendment in its complaint is correct and that its after-thought construction is wrong.

The trial court and the Court of Appeals correctly interpreted the lease amendment in question. It is a cardinal rule of construction that a contract must be read and interpreted in its entirety — from its four corners — and when the amendment of January 1, 1942 (Plf. Ex. 2, R. 515-525), is read in its entirety, it becomes abundantly clear that the parties use the term "drilling for oil" in the sense of The Texas Company, the owner of the oil and gas rights, *drilling a hole by putting a suitable drilling rig to work for the purpose of making out of it an oil well.* The contract speaks of "exploration thereon by *drilling* additional test wells" and "at any time after *drilling* for oil has been started" — all in the sense of *drilling a hole* — a well. It speaks of drilling by means of a "suitable drilling rig" to *certain depths* — all clearly indicating that *drilling wells*, as that term is used in the normal and ordinary sense, was intended. It is clear therefore that under a proper construction of the lease amendment it was necessary for respondent to do some drilling of a hole for its activities to constitute a drilling for oil and that mere geophysical or geological work done in a hole drilled by Freeport for sulphur production would not suffice.

To conclude that respondent was "drilling for oil" within the terms of the lease in question would require that the uncontroverted proof that Freeport did all of the drilling of the hole of each of these nine wells as sulphur wells be thrown out and there be read into the record that respondent set up a suitable drilling rig, spudded in and continued to drill each hole to its abandoned depth, not for sulphur but for oil. Yet this, in its naked form, actually is the contention the petitioner is making.

The petition abounds with references to various geophysical and geological activities on the part of respondent, which petitioner urges should be considered as a prospecting and drilling for oil. But this is contrary to the testimony of petitioner's President, W. T. Doherty, and petitioner's Senior Vice President, Robert Grosjean, and petitioner's expert witness Maynard H. Steig.

Petitioner's President Doherty repeatedly referred to the activities of respondent as having been of a *geophysical* nature. He referred to Well 983 — the seismic well — as a "*geophysical* some kind of a *survey* in that deep well." (R. 37) That petitioner's President Doherty knew that The Texas Company had been gathering information of a geophysical and geological nature is made ever so clear by his testimony of his efforts to obtain this information from respondent's geologists. (R. 43, 44) It was petitioner's President Doherty who solemnly stated that an experienced and prudent operator "before he starts a location for *any* wells assembles all of the geophysical and geological information he can get" — and "all he can get is never too much" (R. 47), and then continued to explain that one of the things that such an operator does *before he makes a location* for any well is to determine the general structure of the dome (of the type present at Hoskins Mound) and that to gather

such information "a prudent operator would usually resort to subsurface information from *drilling operations and also from geophysical* information." (R. 47, 48) Then Mr. Doherty plants himself squarely in agreement with respondent's position by testifying that electric logs and side wall cores of old wells constitute valuable information as an aid to determining *where to locate a well* that is later to be drilled for oil. (R. 48)

Mr. Doherty further testified that he discussed with respondent's representatives "the matter of getting geophysical information and geological information" from them. (R. 54) So again, Mr. Doherty is recognizing these activities in their true relationship.

The entire testimony of Mr. Doherty as given on oral deposition — read, corrected and signed by him — was introduced in evidence at the trial. Mr. Doherty chose not to take the witness stand.

This testimony was not inadvertent by any means. Robert Grosjean, the Senior Vice President of petitioner company, testified that a prudent oil operator does not go to an area in which he holds a lease and drill a well *without first having obtained geophysical and geological information.* Moreover, testified Mr. Grosjean, ". . . it is customary and ordinary and usual in the oil business to obtain all of the geophysical and geological information you possibly can gather *before you resort to any drilling operations . . .*" (R. 212, 218) Grosjean confirmed that all such information an operator can get is "never too much." (R. 214)

Petitioner's Senior Vice President Grosjean frankly admitted that Well 983 was nothing more than a "*geophysical* undertaking for the purpose of determining the configuration of the dome." (R. 224) Moreover, counsel for

petitioner judicially admitted, in answer to the trial court's question, that the drilling of this well standing alone, *would not constitute drilling for oil within the terms of the lease*. (R. 122)

There are further instances of admissions by petitioner's executives that the nine flank wells were not drilled for oil but for sulphur and that respondent's assembling of data from these wells so drilled by Freeport *were purely for geological purposes*. For instance, this was made abundantly clear by this further admission of petitioner's Senior Vice President Grosjean on cross-examination:

"Q. A prudent operator **looking for oil** would have drilled through that overhang, wouldn't he?

"A. Perhaps he would have, and perhaps there is such an intention of an oil company at some date to do so.

"Q. It would have been foolish of him had he been drilling for oil to stop **and not go through the overhang** to get through to the oil?

"A. If he had in mind producing it at that moment, I would say you are correct. I don't know the type of rig available to these wells. Maybe it was not capable of going to that depth.

"Q. **If a man drills for oil and looks for oil and knows it is apt to be found against the flanks of the dome in the overhang, he is going to drill through the overhang?**

"A. **In general terms that's correct.**

"Q. **All right. Actually this only went to the cap rock, didn't it, 1017?**

"A. **I believe that's right.**

"Q. **Didn't even get to the salt, didn't even drill through the overhang or into it?**

"A. **I don't believe it did, but I believe the sulphur company was operating at the time it went into the cap rock itself, and were exploring reportedly for sulphur at that moment.**

"Q. That's right — we agree with that. **Now where do you find your sulphur deposits?**

"A. **You find them in association with the cap rock, around it.**

"Q. **Just the way these wells were drilled, is that right, sir?**

"A. **That is correct.**" (R. 227, 228)

Mr. Grosjean further admitted that without electric logs and side wall cores, a contour map could not have been prepared, and he also admitted that such a contour map is important to an operator who might *later* decide "to develop a lease for oil or gas." (R. 243, 244).

Petitioner's expert Steig on cross-examination was given an opportunity to pass upon and characterize the very activities engaged in by respondent in connection with the seismic well and the flank wells. He was asked to describe the steps that he would take *before drilling for oil* if he were the lessee in an oil, gas and mineral lease — "As a prudent operator, what steps would you take before you started drilling on that lease?" (R. 341) He admitted that he would have a *refraction survey* made in the case of a salt dome, which, as the Court pointed out in its opinion, is admittedly the structure present at Hoskins Mound. Now let us bear in mind that these steps described by the witness Steig are all taken before there is to be any drilling for oil. After admitting that he would have a refraction survey made — *precisely what respondent did in Well 983* — he described this step as the work of a geophysicist and

further described it as a seismic survey. He was then asked the following:

> "Q. All right, sir. Now suppose on that same lease, on that same dome, now after the running of a refraction survey a sulphur operator was also drilling some sulphur wells, and suppose that the operator, the party operating the sulphur wells, permitted you to run electric logs on that well and take side wall cores in those wells, would you do it as a prudent operator, **would you as a prudent operator, gather that information?**
>
> "A. It would be a means of getting that information, yes, sir." (R. 343)

Then he was asked this further question:

> "Q. All I'm going to ask is as a prudent operator you would avail yourself of that information in those sulphur wells, if the sulphur operator permitted you to do it **prior to the time you drilled for oil?**
>
> "A. All right, sir; yes, sir." (R. 343)

Thus, petitioner's own witnesses have admitted they would — *prior* to drilling for oil — take precisely the same steps that petitioner now urges constitute drilling for oil.

Conclusion

Inherent in this forfeiture suit is the strange spectacle of a lessor receiving payments *averaging more than $15,000.00 per month for more than thirty years*, by which the lessee *purchased* the right to explore thoroughly the lease for oil and gas and *purchased* the right to defer drilling for oil until 1986, (according to the lessor's own admissions) — only to find the lessor retain the approximately $11,500,000.00 it so received, yet seek to destroy the lessee's estate by a baseless attempt to accelerate the drilling requirements.

No basis for review exists. Moreover, two Courts which carefully examined the evidence found no merit in petitioner's contentions. It is submitted that their judgments are right and that the writ sought should be denied.

Respectfully submitted,

LEON JAWORSKI
Bank of the Southwest Building
Houston 2, Texas

Of Counsel:

W. S. CLARKE
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Certificate of Service

I hereby certify that copies of the foregoing Reply to Petition for Certiorari were served upon counsel for petitioner on this day of July, 1962, by depositing the same in the United States Post Office or a mail box, with first class postage prepaid, addressed to counsel at his post office address.

.....

Leon Jaworski

APPENDIX A

(Agreement for Geophysical Information Between Freeport and Texaco)

FREEPORT SULPHUR COMPANY
Freeport, Texas

August 30, 1949

Mr. W. C. Kneale
Division Manager — The Texas Company
National Standard Building
Houston, Texas

Dear Mr. Kneale:

Freeport Sulphur Company (hereinafter called "Freeport") is now drilling with its own rig and equipment, its well No. 983 at Hoskins Mound, in Brazoria County, Texas, to a depth of 3500 feet, to and in the salt for the purpose of conducting geophysical work for the benefit of its sulphur producing operations at Hoskins Mound. In connection therewith, Freeport has entered into a contract with McCollum Exploration Company, of Houston, Texas, to conduct a geophysical survey after such well shall have been so drilled to the depth aforesaid, such contract being dated July 8, 1949, and under which Freeport is obligated to pay, among other costs, the sum of $10,000.00 to McCollum Exploration Company, reference being here made to such contract.

The Texas Company (hereinafter called "Texas") is desirous of securing all the information obtained by reason of the drilling of the aforesaid well and the aforesaid geophysical survey, and in addition, Texas desires to have the aforesaid well drilled to a total depth of 7500 feet so that additional geophysical work in connection with such well can be conducted, Texas being desirous of obtaining all such

information in connection with the possibility of conducting prospecting for oil and gas at Hoskins Mound.

Therefore, Freeport agrees to make available to Texas, and to share with Texas, all the geophysical information obtained in drilling the aforesaid well to 3500 feet and from the survey to be performed by McCollum Exploration Company under the aforesaid contract; and in addition, Freeport shall attempt to drill the aforesaid well to a total depth of 7500 feet using the aforesaid rig and equipment, all on the following basis:

(a) Texas shall pay to Freeport, at Freeport, Texas, within thirty (30) days after the aforesaid well shall have been drilled to such depth of 3500 feet and such surveys shall have been performed under the aforesaid contract, one-half of the costs of drilling such well to 3500 feet, including, but not by way of limitation, the cost of all labor, material and other expenses incurred in the drilling of such well, plus, as labor overhead, 10% of the cost of such labor, and, as material overhead, 10% of the cost of such material, and, as supervision and administrative overhead, 10% of the total cost of labor, material, other costs, and labor overhead and material overhead; and in addition, Texas shall pay to Freeport one-half of the aforesaid sum of $10,000,00 to be paid by Freeport to McCollum Exploration Company, and one-half of such other costs which Freeport may incur under such contract.

(b) In addition, Texas shall also pay to Freeport, at Freeport, Texas, within thirty (30) days after being billed therefor, the entire cost of drilling the aforesaid well below 3500 feet and down to the total depth thereof, including, but not by way of limitation, the cost of all labor, material and other expenses, plus, as labor overhead, 10% of the cost of such labor, and as material overhead, 10% of the cost of such material, and as supervision and administrative

overhead, 10% of the total cost of such labor, material, other expenses and labor overhead and material overhead. In addition, Texas shall pay, at the time and place as aforesaid, the sum of $50.00 per day for rental of the drilling rig and equipment used on such well, the time of such charge to begin at the time Freeport shall be ready to commence the drilling of such well below 3500 feet and down to the total depth thereof, and to continue until the drilling of such well shall have been discontinued. Texas shall furnish, at its own expense, any and all additional equipment necessary to equip and make such drilling rig safe and satisfactory for drilling to the aforesaid depth of 7500 feet. In the event it becomes necessary that Texas furnish, among other things, draw works for such rig, then, the aforesaid rig rental, beginning at the time such draw works shall have been so furnished, shall be reduced from $50.00 per day to $25.00 per day.

(c) While the projected depth of the aforesaid well shall be 7500 feet, there shall be no obligation on the part of Freeport to drill such well to such depth or any other depth, it being agreed that Freeport shall have the right to discontinue the drilling of such well at any time it may desire without any further obligation to Texas therefor or in connection therewith, but Texas shall, in the event such well shall not be drilled to such depth of 7500 feet, reimburse Freeport as aforesaid for the depth to which such well shall have been so drilled. After such well shall have been drilled to such depth of 3500 feet, Texas may at any time direct Freeport to discontinue the drilling of such well. In such event, Texas shall reimburse Freeport as aforesaid for the depth to which such well shall have been so drilled.

(b) The Texas Company shall, at its own expense, have performed such geophysical work in connection with such well, below the aforesaid depth of 3500 feet, as it may

desire. Texas shall also reimburse Freeport as aforesaid for any services which may be performed by Freeport, at the request of Texas, in connection with such work below such depth of 3500 feet.

Nothing herein contained shall have the effect of amending, altering, modifying or in any manner changing that certain contract between The Texas Company, Freeport Sulphur Company and Freeport Texas Company, dated March 14, 1922, pertaining to Hoskins Mound, or any supplemental contracts or agreements with respect to Hoskins Mound heretofore executed between such companies, or any of them, or their successors or assignees, reference being here made to all such contracts and agreements.

If the above is in accordance with your understanding, please so indicate by signing the extra copy of this letter herewith enclosed, as indicated below, and returning such copy to us.

Very truly yours,

FREEPORT SULPHUR COMPANY,
By G. C. McMILLEN.

Accepted this 6th day of September, 1949.

THE TEXAS COMPANY,
By WM. C. KNEALE.

Form Approved:

R. O. SMITH

APPENDIX B

(Agreement for Geological Information Between Freeport and Texaco)

Houston, Texas
April 18, 1950

Electrical Logging, Freeport Sulphur Company Wells, Hoskins Mound, Brazoria County, Texas.

Freeport Sulphur Company
Freeport, Texas

Gentlemen:

Referring to discussions between representatives of our respective companies looking toward an arrangement whereby The Texas Company might acquire information from electrically logging and sidewall coring certain sulphur exploratory wells which you contemplate drilling on the flanks of the Hoskins Mound Dome, above county:

This will confirm the understanding of the agreement which crystallized from the above mentioned discussions (and which shall henceforth be considered the entire agreement of the parties relative to above matter) as follows:

(1) The Texas Company will reimburse Freeport Sulphur Company for delay rig time including that waiting on service company (Halliburton or Schlumberger), running of log, sidewall coring, and if necessary reconditioning of hole due to operations conducted for its benefit, at the rate of $17.00 per hour.

(2) The Texas Company shall pay for any damage to, or loss of, hole as a result of operations conducted for its benefit and shall also indemnify you against any other loss or expenses which may be suffered or sustained as a result of any operations so conducted for its benefit.

(3) We hereby agree to hold you harmless for all damages or expenditures, irrespective of character, which might directly result from operations performed at our request."

It is our understanding that approximately nine of the wells shown in red circle on the attached plat, marked Exhibit "A," will probably be drilled at the approximate locations shown and that you may drill the remainder of the wells shown on such plat at the approximate locations shown, and that you will notify the writer, or such other person as he may designate, by telephone 24 hours prior to the time it will be in order to commence work to be performed for our account.

This understanding may be canceled by either party at any time.

In the event the foregoing expresses your understanding of the agreement relative to the above mentioned exploratory program, kindly so indicate by signing the enclosed copy of this letter in evidence of such fact and returning the same to us at your early convenience.

Yours very truly,

THE TEXAS COMPANY,
Producing Department,
By WM. C. KNEALE,
(Wm. C. Kneale),
R. O. SMITH.

The terms and conditions hereinabove outlined conform to our understanding of the agreement relative to the subject matter hereof and are, in all things, acceptable to us.

FREEPORT SULPHUR COMPANY,
By G. C. MCMILLEN.

(Date) Apr. 25, 1950.

APPENDIX C

Texas Rules of Civil Procedure, Rule 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused". In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for want of jurisdiction."

In cases of conflict named in subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended, the Supreme Court shall grant the application for writ of error, unless it be in agreement with the decision of the Court of Civil Appeals, in the case wherein the application is filed, in which event said Supreme Court shall so state in its order, with such explanatory remarks as may be deemed appropriate. In cases where the decision of the Court of Civil Appeals is in conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse the same on the application for writ of error, making, at the same time, such further orders as may be appropriate.